# ST. GEORGE TUCKER AND THE LEGACY OF SLAVERY

**Michael Kent Curtis**

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INTRODUCTION

St. George Tucker (1752-1827) was a distinguished law professor, legal scholar, and judge. He was also an unsuccessful social reformer: a critic of slavery who sought to make emancipation acceptable to slaveholding Virginia. As a legal scholar, Tucker published an edition of William Blackstone's Commentaries that revised the Commentaries for use by Americans.\(^1\) Compared to Blackstone, Tucker embraced a more functional and protective view of freedom of speech and press, one better designed for a government where "the people" are the ultimate authority.\(^2\) Tucker also supported strong protections for religious liberty. While Tucker's writing embraced popular sovereignty and democracy, he opposed broader suffrage, opposed one (white) person-one vote, and argued for apportionment schemes that would protect wealth in land and slaves from a broader democracy.

Tucker supported the existing Virginia legislative apportionment plan, one that heavily favored slaveholding areas. In addition, he proposed a plan to model representation in Virginia on "federal numbers," counting slaves as three-fifths of a person.\(^3\) These schemes were designed to protect concentrated wealth; they all gave extra political power to slaveholders.\(^4\) Still, to some extent, Tucker also favored legal devices designed to protect democracy from an aristocracy of certain kinds of wealth.\(^5\)

Tucker's concern for the protection of concentrated wealth from democracy was in serious tension with a more democratic vision


\(^2\) St. George Tucker, Of the Several Forms of Government, in 1 Tucker, Blackstone's Commentaries, supra note 1, ed. app. at 19-23 [hereinafter Tucker, Several Forms of Government].


\(^4\) Id. at 18-19.

\(^5\) See infra Part III.B.
that was beginning to emerge in the nation. In 1830 and 1831, the pro-slavery apportionment of the Virginia legislature helped defeat a resolution aimed at ending slavery in Virginia. Tucker favored state-supported education, but the type of representative government Tucker favored may have helped to blight plans for public education. Protecting the wealthy from taxes seems to have been a factor in antebellum Virginia's refusal to establish a statewide system of public education.

Tucker wrote that slavery was inconsistent with democracy, but he did not elaborate on the insight. After Tucker's death, the inconsistency became particularly stark. From one perspective, the tension in Tucker's thought between democracy and the protection of concentrated wealth in land and slaves is a problem from the bygone age of slavery. Similarly, his struggle with race and slavery may seem equally remote. From another perspective, the tension in Tucker's thought is simply a special case of an ongoing dilemma for American democracy, involving tensions between wealth, political equality, race, and egalitarian ideals.

Parts II-IV of this Article will examine St. George Tucker's views on slavery, free speech, wealth, democracy, and education. Part V will examine later developments in Virginia on these issues before the Civil War and will look at the later nineteenth-century career of ideas raised in Tucker's work. These ideas include free speech, states' rights, and the status to be accorded to free blacks. Finally, Part VI will evaluate the ambiguous legacy of St. George Tucker.

7. See infra note 330 and accompanying text.
I. ST. GEORGE TUCKER ON SLAVERY

A. Tucker’s Condemnation of Slavery

St. George Tucker opened his 1796 Dissertation on Slavery with an unequivocal condemnation of the institution:

Whilst America hath been the land of promise to Europeans ..., it hath been the vale of death to millions of the wretched sons of Africa.... Whilst we were offering up vows at the shrine of Liberty ... we were imposing upon our fellow men, who differ in complexion from us, a slavery, ten thousand times more cruel than the utmost extremity of those grievances and oppressions of which we complained. Such are the inconsistencies of human nature ...; such that partial system of morality which confines rights and injuries to particular complexions; such the effect of that self-love which justifies, ... not according to principle, but to the agent.10

Tucker referred to the slaves that American revolutionaries had failed to free as “our brethren whom we held in bondage.”11

In Tucker’s view, invocations of liberty and equality by supporters of the American Revolution were relevant to the morality of slavery.12 In contrast, in the 1857 Dred Scott decision, Chief Justice Taney insisted that the framers of the Declaration of Independence did not intend to include even free black descendants of slaves.13 Taney insisted that free blacks were not included among “all men,” who the Declaration announced were “created equal” and “endowed by their Creator with certain unalienable rights.”14

Tucker took a different view of the moral implications of revolutionary maxims of equality. He said that slavery defied the solemn and sacred truth that Virginians had made “the foundation of their government”: that “all men are by nature equally free and independent”15 and “have certain rights of which they cannot deprive or

10. Id.
11. Id. at 9.
12. Id. at 25-28.
14. Id. (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).
15. TUCKER, DISSERTATION ON SLAVERY, supra note 9, at 28 (quoting VA. CONST. art.
divest their posterity,” including “the enjoyment of life and liberty, with the means of acquiring and possessing property.”¹⁶ Nor, as Tucker saw it, were the strong and clever entitled to enslave those with lesser gifts. Men were entitled to equal privileges in spite of the “bare unkindness of nature or of fortune.”¹⁷

According to Tucker, slavery could not be reconciled with American declarations of fundamental rights without degrading slaves below the rank of human beings.¹⁸ Though the “policy of [the Virginia] legislature, as well as the practice of slave-holders,” seemed to do just that, Tucker insisted that it was “time we should admit the evidence of moral truth, and learn to regard them as our fellow men.”¹⁹ He attributed the coexistence of slavery with Virginia’s Declaration of Rights to the “weakness and inconsistency of human nature.”²⁰

Tucker’s Dissertation on Slavery contains his “melancholy review” of Virginia laws that deprived slaves “not only of the right of property, and the right of personal liberty, but even the right of personal security.”²¹ Tucker wrote:

From this view of our jurisprudence respecting slaves, we are unavoidably led to remark, how frequently the laws of nature have been set aside in favour of institutions, the pure result of prejudice, usurpation, and tyranny. We have found actions, innocent or indifferent, punishable with a rigour scarcely due to any, but the most atrocious offenses against civil society; justice distributed by an unequal measure to the master and the slave; and even the hand of mercy arrested .... ²²

These horrors, Tucker believed, came not from the bloody temper of Virginians but “from those political considerations indispensably necessary, where slavery prevails to any great extent.”²³ To Tucker, these facts showed the need to abolish slavery.

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I, § 1).

16. Id. at 48.
17. Id.
18. Id. at 48-49.
19. Id. at 49.
20. Id. at 28.
21. Id. at 55.
22. Id. at 64.
23. Id. at 65.
In 1829, in *State v. Mann*, Justice Thomas Ruffin of the North Carolina Supreme Court also said slavery required harsh powers for masters. Ruffin held that a man who had leased a slave was not guilty of any crime when the man shot the slave because the slave had run away from him while he was "chastis[ing]" her. Ruffin reasoned that the law must turn a blind eye to acts of cruelty and barbarity aimed at slaves by their masters. He held that "[t]he slave, to remain a slave, must be made sensible that there is no appeal from his master." 

Ironically, American revolutionaries, many of whom were slaveholders, saw England as threatening them with slavery. Tucker's analysis of three types of slavery explains why. First, according to Tucker, a nation "deprived of the right of being governed by its own laws ... may be considered as in a state of political slavery." 

Second, Tucker described a state of "civil slavery" that exists whenever natural liberty is "further restrained than is necessary and expedient for the general advantage." He said that civil slavery also exists whenever an inequality of rights or privileges exists between the subjects or citizens of the same state, except such as necessarily results from the exercise of a political office. Tucker continued, "the pre-eminence of one class of men must be founded and erected upon the depression of another; and the measure of exaltation in the former, is that of the slavery of the latter." 

Tucker said that this species of slavery existed in every government in Europe before the French Revolution, in the American colonies before independence, and

24. *State v. Mann*, 13 N.C. (2 Dev.) 263, 265-67 (1829) ("The power of the master must be absolute to render the submission of the slave perfect. I must freely confess my sense of the harshness of this proposition.").
25. *Id.* at 267.
26. *Id.*
27. *Id.*
28. TUCKER, DISSERTATION ON SLAVERY, supra note 9, at 15.
29. *Id.* at 16.
30. *Id.* at 16-17.
31. *Id.* at 17.
notwithstanding the maxims of equality which have been adopted in their several constitutions, it exists in most, if not all, of them, at this day, in the persons of our free Negroes and mulattoes; whose civil incapacities are almost as numerous as the civil rights of our free citizens. 32

Tucker then enumerated examples of this second species of slavery imposed on free blacks, including denial of suffrage and political office, facing whippings for resistance to a white person, denial of the right to testify in any prosecution or civil action where a white man was a party, mandatory registration for free blacks residing or employed in any town, and prohibition of the migration of free blacks into Virginia. 33 Anticipating Alexis de Tocqueville, Tucker saw these “incapacities and disabilities” as the fruit of a third type of slavery: “domestic [chattel] slavery.” Domestic slavery was a system where “one man is subject to be directed by another in all his actions.” 34

For Tucker, the evil of slavery was also reflected in the slave trade. 35 Tucker described the slave trade as a “nefarious ... traffic” characterized by “the most atrocious aggravations of cruelty, perfidy, and intrigues.” 36 Though some might seek to mitigate the evil by blaming it on the African tribes that participated, Tucker would have none of it. 37 Following Blackstone, Tucker rejected the claim that persons captured in war may be enslaved. 38 Even if one were to concede, Tucker said, that “a captive taken in a just war” might be enslaved by the conqueror, that would not justify “the claim of Europeans to reduce the natives of Africa” to slavery. 39 “[T]he Europeans have ... by the most insidious (I had almost said infernal) arts, fomented a kind of perpetual warfare among the ... people of Africa” in order to produce a supply of slaves. 40

32. Id.
33. Id. at 17-19 (noting, however, that an exception existed in the case of a wanton assault on a black person).
34. Id. at 20.
35. Id. at 22.
36. Id. at 13.
37. See id. at 21-23.
38. Id.
39. Id. at 23.
40. Id. at 23-24.
Among his arguments for ending slavery, Tucker included one later made by abolitionists—the danger of slave revolts. He noted that "so large a number of oppressed individuals" might "one day be roused to an attempt to shake off their chains."\textsuperscript{41} When abolitionists made this argument, it infuriated slaveholders, who read it as tending (and therefore intended) to cause slave revolts.\textsuperscript{42}

Tucker's condemnation of slavery was powerful. When he turned to freeing the slaves, Tucker made many concessions to racial prejudice, and he admitted that he was somewhat infected by it.\textsuperscript{43} His attitude is not surprising given the society in which he lived and the practical political obstacles he faced. When the slaves were finally freed by the Civil War and the Thirteenth Amendment, they did far better, economically and politically, than Tucker expected, and they did so in difficult circumstances.\textsuperscript{44}

\textbf{B. Tucker's Plan to Rid Virginia of Slavery}

Total and immediate emancipation and full equality struck Tucker as impractical. He had a negative view of the capacity of a people subjected to years of slavery.\textsuperscript{45} He thought immediate emancipation would not work because blacks had been trained to obedience and submission and whites were used to arrogance and assumptions of superiority.\textsuperscript{46} Blacks "would soon become idle, profligate, and miserable. Unfit for their new condition, and unwilling to return to their former laborious course, they would become the caterpillars of the earth, and the tigers of the human race."\textsuperscript{47}

Tucker supported his view of the probable consequences of general and immediate emancipation by the "recent history of the

\textsuperscript{41} Id. at 39.
\textsuperscript{43} Tucker, Dissertation on Slavery, \textit{supra} note 9, at 84-85.
\textsuperscript{45} Tucker, Dissertation on Slavery, \textit{supra} note 9, at 75.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 77.
French West Indies.”48 In what was then the French colony of Saint-Dominque, slaves had rebelled against their masters.49 The French sent an army to crush the rebellion, but the slaves won.50 After their victory, the slaves renamed the country Haiti, killed many of the country’s whites, and destroyed the plantations and their infrastructure in an effort to prevent rebuilding the plantation slave system.51 Though emancipation through slave rebellion and race war was significantly different from immediate voluntary emancipation, Tucker apparently believed the results would be the same.52

Tucker also saw serious impediments to establishing a colony of immediately emancipated slaves within the United States. He doubted that the “illiterate and ignorant” former slaves would be capable of instituting a government.53 “[A]ccustomed to being] ruled with a rod of iron,” blacks “will not easily submit to milder restraints. [T]hey would become hordes of vagabonds, robbers and murderers.”54 In spite of these remarkably negative views, Tucker also rejected simply expelling the slaves from the United States.55 He felt that expulsion would produce famine, disease, and misery for the former slaves.56

Finally, Tucker considered retaining the blacks and incorporating them into the Commonwealth of Virginia.57 He was convinced, however, by Jefferson’s rejection of this option, which Tucker quoted at length in a footnote:

Deep-rooted prejudices entertained by the whites; ten thousand recollections by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances will divide us into parties and produce convulsions which will probably never end but in the extermination of one or the other race.58

48. Id.
49. JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED 336 (2005).
50. Id.
51. Id.
52. TUCKER, DISSERTATION ON SLAVERY, supra note 9, at 77.
53. Id. at 84.
54. Id.
55. Id. at 74-76.
56. Id.
57. Id. at 84-85.
58. Id. at 84-85 n.a (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA
Tucker also noted Jefferson's other reason against "incorporation," namely speculations about the inferiority of blacks. To his credit, Tucker was skeptical of assertions of racial inferiority, but he did not totally discount them.

According to Tucker, opponents of abolition said abolition required establishing both civil and political equality. This was, he said, a potent argument for those who sought to perpetuate slavery. Tucker, however, rejected the idea that civil and political slavery must stand or fall together.

When men enter society, according to Tucker, they have "a right to admit, or exclude any description of persons ... they think proper." If blacks might be inherently inferior, Tucker asked if sound policy would not therefore "advise their exclusion from a society in which they have not yet been admitted to participate in civil rights? He warned that future admission might "eventually depreciate the whole national character."

Tucker frankly admitted that such concerns might reflect prejudice. Remarkably, he said that "[e]arly prejudices ... would render an inhabitant of a country where Negro slavery prevails, an improper umpire" between those who argued for and those who denied racial inferiority. Still, where prejudices had taken "such deep root in our minds, as to render it impossible to eradicate this opinion," Tucker suggested—anticipating Abraham Lincoln—that "so general an error, if it be one" must be respected. But he insisted that the need to accommodate prejudice did not justify slavery. Tucker's metaphor reveals a negative view of the slaves: "Shall we not relieve the necessities of the naked diseased beggar, unless we will invite him to a seat at our table ...?"

(1787).

59. Id. at 87-88.
60. Id. at 86.
61. Id. at 86-87.
62. Id.
63. Id. at 87.
64. Id.
65. Id.
66. Id. at 87 n.b.
67. Id. at 87.
68. Id.
69. Id.
So Tucker sought a middle course between immediate emancipation and full equality on one hand and continuance of chattel slavery on the other, that is, "between the tyrannical and iniquitous policy which holds so many human creatures in a state of grievous bondage, and that which would turn loose a numerous, starving, and enraged banditti, upon the innocent descendants of their former oppressors."\(^{70}\) He counted on "nature, time, and sound policy" to produce a change that would avoid these extremes.\(^{71}\)

The "sound policy" Tucker advocated was his complex plan for gradual emancipation. He proposed to free all female slaves born after the passage of his act of emancipation.\(^{72}\) These freed slaves would transmit freedom to all their children, both male and female.\(^{73}\) Newly freed female children would be bound to service until age twenty-eight,\(^{74}\) but males born to slaves after the act's passage would remain slaves.\(^{76}\) Males would begin to be freed only if born to a freed female.\(^{76}\) This was gradual emancipation indeed. Tucker adopted a plan for compulsory labor modeled on English poor laws for those free blacks who lacked employment after being freed.\(^{77}\)

Because the law recognized property in slaves, Tucker suggested that immediate and total emancipation without compensation would violate property rights.\(^{78}\) But Tucker's plan did not compensate slaveholders for the loss of people who would have been born as slaves.\(^{79}\) He justified that feature of his plan in two ways. First, he denied property rights in unborn children.\(^{80}\) Second, he said that the loss of the mother's labor for nine months and maintenance of the child until age twelve or fourteen "is amply compensated by the services of that child for as many years more, as he has been an expence to them."\(^{81}\)

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70. Id. at 88.
71. Id.
72. Id. at 89.
73. Id.
74. Id.
75. Id.
76. Id. at 89-90.
77. Id.
78. Id. at 79-80.
79. Id. at 94.
80. Id. at 94-95.
81. Id. at 95.
Under Tucker's plan, free blacks would have been denied many rights. To use terms Tucker uses elsewhere in his dissertation, "civil slavery" would replace "domestic slavery." Blacks would be denied the right to vote, hold public office, own property, keep arms, marry whites, serve on juries, testify against whites, and make a will. Still, Tucker said, "[t]heir personal rights, and their property, though limited, would, whilst they remain among us, be under the protection of the laws." Their condition, he said, would be similar to that of "the labouring poor in most other countries. Under such an arrangement we might reasonably hope, that time would either remove from us a race of men, whom we wish not to incorporate with us, or obliterate those prejudices, which now form an obstacle to such incorporation." He seems not to have seen that such a caste system would perpetrate prejudice.

Tucker faced the dilemma of the reformer whose proposed reform confronts deep prejudices. He admitted that his harsh discriminations against free blacks "appear to savour strongly of prejudice." But a reformer facing deep prejudices, he suggested, "must either encounter, or accommodate himself to prejudice.—I have preferred the latter; not that I pretend to be wholly exempt from [prejudice] ...." Tucker justified his approach as necessary to "avoid as many obstacles as possible to the ... abolition of slavery." Though Tucker opposed banishing blacks, he wrote, "I wish not to encourage their future residence among us. By denying them the most valuable privileges which civil government affords, I wished to render it their inclination and their interest to seek those privileges in some other climate." After all, he concluded, "[b]y releasing them from the yoke of bondage, and enabling them to seek happiness wherever they can hope to find it, we surely confer a benefit, which no one can

82. Id. at 16, 20.
83. Id. at 91-92.
84. Id. at 94.
85. Id.
86. Id. at 92.
87. Id.
88. Id.
89. Id.
sufficiently appreciate, who has not tasted of the bitter curse of compulsory servitude.”

These concessions to bigotry put practical obstacles in the way of emancipation. If, as Tucker envisioned, blacks abandoned the commonwealth that subjected them to cruel discriminations, Virginia would need to replace a large part of its laboring population. Since Tucker’s plan was extremely gradual, he apparently hoped that Caucasian immigrants would fill the void.

Tucker’s *Dissertation on Slavery* was dedicated “[t]o the General Assembly of Virginia,” and he sent copies to both houses with a request for consideration. The House tabled the matter without discussion, and the Senate thanked Tucker and expressed a vague hope that one day “[l]iberty in our country shall be inseparable from life.”

Tucker was disappointed with the lack of interest in his work. He wrote to a correspondent in Massachusetts that no one had even read his proposal; self-interest had silenced “the voice of reason,” but he hoped that one day “actual suffering ... will open the oppressor’s eyes.” In the meantime, Tucker gave up hope for action on emancipation in the foreseeable future.

Tucker’s *Dissertation* expresses empathy for slaves, but his expressed empathy did not often appear in Tucker’s personal relations with his own slaves. Tucker apparently suffered from some of the blinding self-interest that he saw as an obstacle to his emancipation plan. If so, it was a very human failing. About the time that Tucker wrote his letter to the Virginia Assembly transmitting his anti-slavery dissertation, Tucker wrote a letter to his agent enclosing a power of attorney that authorized his agent to sell several of his female slaves. “The high price of negroes at

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90. *Id.* at 93.
91. *Cf. id.* at 92-93 (encouraging slaves to seek happiness outside the colonies).
92. *FREEHLING, supra* note 6, at 95.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 95-96.
97. *Id.* at 96.
98. *Id.*
99. Doyle, *supra* note 3, at 105-06.
100. *Id.* at 105.
present,” Tucker wrote, encouraged him to expect more than the two hundred pounds that he specified as the minimum price. With respect to these slaves, Tucker rejected an offer from a Virginian who wanted to free them. The man, short of cash, had offered Tucker western land bonds in exchange for the slaves. Tucker’s treatment of his slaves often revealed “an entrepreneur adept at squeezing maximum profit” from slavery.

A few of Tucker’s fellow Virginians were more consistent in advocating human rights for slaves and were able to identify far better with slaves as human beings. One was Robert Pleasants, a wealthy member of Virginia’s elite and an anti-slavery Quaker. In 1783, Pleasants freed eighty of his own slaves valued at three thousand pounds sterling. He also founded an abolition society in Richmond, wrote anti-slavery tracts, and supported black education. Pleasants also fought a two-year, and ultimately successful, legal battle to enforce his father’s will, which attempted to free his father’s slaves before state law allowed such action. Pleasants believed that “blacks and whites could co-exist as equals” and thought that plans to remove ex-slaves were futile and unjust.

On May 30, 1797, Pleasants wrote Tucker a letter critiquing Tucker’s *Dissertation on Slavery*. Pleasants wrote that he favored a more rapid gradual emancipation, one that would free all slaves, not just female slaves, born after the act’s passage. Pleasants also disapproved of Tucker’s “‘proposition of prohibiting free Negroes and Mulattoes from holding estates in land, or other property, or to be restrained by law from contracting marriages with whites,

101. *Id.*
102. *Id.* at 107.
103. *Id.* at 107-08.
104. *Id.* at 106; *see also* id. at 105-21 (discussing Tucker’s willingness to employ his slaves with an eye toward maximizing profit).
107. *Id.*
108. *Id.*
111. *Id.*
disposing of property by will, or enjoying other rights of citizens.”

He said that “labouring people are ... the riches of every country.” Because slaves made up the bulk of Virginia’s work force, if they were given “suitable encouragement and proper instruction,” it would benefit Virginia to retain them.

In writing back to Pleasants, Tucker defended the discriminatory provisions in the Dissertation as the only hope for passage of a plan for abolition. He admitted that “there was in one instance a degree of prejudice in my own breast .... I mean the prohibition of intermarriages.”

Pleasants asked Tucker to sign a petition to the legislature asking for emancipation without many of the restrictions Tucker proposed. Tucker said that he doubted that Pleasants’ plan “will ever meet with success” and that he did not fully agree with it, but he signed as requested.

II. TUCKER ON FREE SPEECH ON ALL PUBLIC MEASURES

A basic principle of democracy is the right of the people to rule directly or through their elected representatives. The sovereignty of the people assumes that the people are capable of making basic political choices. Meaningful choice requires the right to discuss public measures, including those that challenge dominant political and economic institutions. In 1799, Tucker recognized that democratic government requires broad protection of free speech.

In his 1799 Letter to a Member of Congress Respecting the Alien and Sedition Act, Tucker attacked the Sedition Act as inconsistent with the First Amendment. A major strand of Tucker’s argument was based on popular sovereignty, states’ rights, and a limited

113. Id. at 150.
114. Id.
115. Id. at 148.
116. Id. at 149.
117. Id. at 310 n.236.
118. Id. at 151.
119. ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS; RESPECTING THE ALIEN AND SEDITION LAWS (1799) [hereinafter TUCKER, LETTER TO A MEMBER OF CONGRESS].
reading of federal power. In addition to those arguments, Tucker made functional and structural arguments for broad protection of free speech, claiming that broad protection of free speech was essential to democratic government.

Tucker began his discussion with twelve basic postulates. Of these, at least the first nine were related to popular sovereignty and states' rights. (1) "[T]he SOVEREIGNTY of the United States resides in the PEOPLE...." (2) The Constitution created the federal government and limited its powers. (3) The federal government had only that portion of the people's sovereign power entrusted to its "public functionaries" who were "the agents and servants of the PEOPLE." (4) Prior to the adoption of the Constitution of the United States the states were sovereign and independent and had all the attributes of a sovereign power. (5) "Consequently; that the powers not delegated to" the federal government "by the constitution, nor prohibited by it to the states, [were] reserved to the states ... or to the people." (6) The federal government was limited to "expressly" delegated powers and those "necessary and proper" to effectuate them. (7) Enumeration of powers "weakens" the force of the law "in cases not enumerated." (8) "[E]very power which was carved out of the sovereignty of the states ... is to be construed strictly, wherever it may derogate from any power reserved to the states by the federal constitution." (9) Every federal power which may impair "the rights of citizens granted to secure the blessings of liberty" is to be strictly construed and "where [such power] may operate to the security and preservation of those blessings" it is to be construed "liberally, and for their benefit."

120. Id. at 39.
121. Id. at 2.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id. at 3.
129. Id. Tucker's ninth postulate combines concern with protection of individual rights against the federal government with his limited reading of federal power. See id.
In addition to these nine postulates, Tucker advanced three that, like popular sovereignty, dealt directly with the system of freedom of expression required for democratic government. Although the term "democrat" was sometimes hurled as a term of abuse at this time in American history, Tucker repeatedly referred to the American government as democratic: (10) In the United States the people are sovereign. "[I]n a representative government it is essential ... that the people should be fully informed of the conduct of their servants, and possess the uncontrollable right of censuring, or approving, according to their judgment."\textsuperscript{130} (11) This right includes the "equally uncontrollable right to examine the motives which probably led to that conduct, which they have a right to censure or applaud."\textsuperscript{131} (12) When the right of the citizen to criticize is denied, "the practical right of election is in danger," and when it is prohibited, "the nature of the government [is] changed."\textsuperscript{132}

Tucker also made a textual argument in favor of free speech and press by comparing the First Amendment with the Sedition Act.\textsuperscript{133} Tucker italicized what he saw as the inconsistency between the First Amendment and the Act. The First Amendment prohibited any law "abridging the freedom of speech, or of the press,"\textsuperscript{134} whereas the Sedition Act punished any person who shall "write, print, utter or publish ... any false, scandalous and malicious writing[s]" against the President, Congress, or the U.S. government "with intent to defame" any of them.\textsuperscript{135} The texts, he said, "do not militate with each other; nor with the fundamental principles of our representative democracy."\textsuperscript{136}

Tucker understood, as many of his contemporaries did not, a crucial part of the idea of a loyal opposition. He understood that criticism of government officials and their policies must not be confused with an attack on government. In this respect, Tucker's views mirrored those expressed by a number of critics of the Sedition Act who insisted that criticism of public officials and their

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 29.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 30.
policies was essential for a functioning representative government.\textsuperscript{137}

Defenders of the Sedition Act had insisted that the power "to punish false, scandalous and malicious writings against the government, with intent to stir up sedition" was a law necessary and proper for carrying out the national government's delegated powers.\textsuperscript{138} Tucker responded:

[W]ere it granted them (which is by no means the case) that congress has a right to pass a law to punish ... writings against the government with "intent to stir up sedition," it would not prove that it had a right to pass an act to punish writings calculated to bring congress or the President into contempt or disrepute. For such contempt or disrepute may be entertained ... without incurring the guilt of sedition against the government, and without the most remote design of opposing or resisting any law, or any act of the president done in pursuance of any law....\textsuperscript{139}

The pro-Sedition Act report that Tucker criticized in his Letter to a Member of Congress also argued that "it would be manifestly absurd to suppose that a government might punish sedition, and yet be void of power to prevent it, by punishing those acts which plainly and necessarily lead to it."\textsuperscript{140} By this view, government could punish speech that had a tendency to cause sedition. Tucker forthrightly rejected this bad tendency argument. If accepted, he wrote, "we have ... delivered ourselves bound hand and foot into the power of the federal government."\textsuperscript{141} Tucker continued:

\textsuperscript{137} E.g., CURTIS, supra note 42, at 68-69, 73, 75.
\textsuperscript{138} TUCKER, LETTER TO A MEMBER OF CONGRESS, supra note 119, at 30.
\textsuperscript{139} Id. James Roger Sharp cites a speech in Congress by Albert Gallatin making a similar distinction between opposition to the administration and opposition to the Constitution. JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 179 (1993). The distinction is implicit in many Republican criticisms of the Sedition Act. See, e.g., supra note 137 and accompanying text. Another important component of the idea of a loyal opposition is recognizing that one's benighted opponents are nonetheless loyal to the nation. That has proved more difficult, both in the early Republic and since. See generally SHARP, supra, at 5, 7, 141-42, 274, 281-82, 286-87 (discussing the difficulties of recognizing loyal opposition).
\textsuperscript{140} TUCKER, LETTER TO A MEMBER OF CONGRESS, supra note 119, at 30-31.
\textsuperscript{141} Id. at 31.
An expression of disapprobation of any measure of government may be construed plainly and necessarily to lead to sedition; the smallest complaint, might receive the same construction; the most respectful remonstrance ...[is] liable to the same liberal interpretation; any argument in defence of an opinion uttered on the subject, might be tortured into a seditious speech, and as such, according to this doctrine punished as leading to sedition.\textsuperscript{142}

Tucker also rejected the claim that press freedom was limited to a ban on prior restraint—that one could publish without permission but be punished afterward for what was written. He said that the precedent supporting that truncated view of press freedom originated in “that mirror of justice, the high court of star chamber, in England.”\textsuperscript{143} Parliament itself had rejected the star chamber as the “means to introduce an arbitrary power and government.”\textsuperscript{144}

Remarkably, and like other Jeffersonian Republicans, Tucker seems to have rejected the claim that punishing the “licentiousness of the press” was not an “abridgement of its liberty.”\textsuperscript{145} Tucker argued that the “word, licentiousness, as applied to the PRESS, and to writings against the government, is a word of the most indefinite signification of any in the English language.”\textsuperscript{146} Finally, Tucker quoted James Burgh, the British educator and political writer: “All history shews the necessity, in order to the preservation of liberty, of the subjects having a watchful eye on the conduct of governments and of every subject being not only secured, but encouraged in alarming his fellow-subjects, on occasion of every attempt on public liberty.”\textsuperscript{147} Tucker said that the claim that governments have always exercised power to punish criticism did not justify continu-

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 33.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 35.
\textsuperscript{146} Id.; see, e.g., CURTIS, supra note 42, at 70 (“Licentiousness 'was so indefinite a thing, that what was deemed licentiousness today by one set of men, might, by another set, tomorrow, be enlarged ....'” (quoting Congressman John Nicholas)); id. at 76 (“[M]en find no difficulty in pronouncing opinions to be both false and licentious, which differs from their own.” (quoting John Taylor)). Though Tucker's remark was made in connection with an exercise of federal power, logically applied it raised similar questions about the concept of licentiousness as a tool by state governments to limit speech.
\textsuperscript{147} TUCKER, LETTER TO A MEMBER OF CONGRESS, supra note 119, at 36.
ing the abuse. He cited provisions for press freedom in the Virginia Declaration of Rights and emphasized that other states had similar guarantees.\textsuperscript{148}

In his edition of Blackstone's \textit{Commentaries}, Tucker also embraced a functional view of free speech and press, a view suited to democratic government. Here, however, some federalism qualifications begin to appear. According to Tucker, it was "one of the great fundamental principles of the American governments, that the people are the sovereign, and those who administer the government their agents, and servants, not their kings and masters."\textsuperscript{149} Consequently, "it would have been a political solecism to have permitted the smallest restraint upon the right of the people to enquire into, censure, approve, punish or reward their agents."\textsuperscript{150} Therefore,

[the constitution ... secures to them the unlimited right to do this, either by speaking, writing, printing, or by any other mode of publishing.... This being the only mode by which the responsibility of the agents of the public can be secured, and practically enforced, the smallest infringement of the rights guaranteed by [the First Amendment to the United States Constitution] must threaten the total subversion of the government. For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.\textsuperscript{151}

Tucker also embraced liberty of speech and discussion in all speculative matters. The liberty consisted of

\begin{quote}
the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; ... the expediency or
\end{quote}

\textsuperscript{148} Id. at 37-38.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
inexpediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name.\textsuperscript{152}

The extent to which the personal injury and property exceptions limit Tucker's democratic rationale for free speech is unclear.

Tucker said any power to restrain speech was left to the states by the federal Constitution.\textsuperscript{153} Still, his structural and functional arguments for free speech reasonably applied to state governments, which he also considered democratic. Tucker noted that state constitutions also typically had protections for free speech and press.\textsuperscript{154}

Still, Tucker's 1803 discussion of press freedom, written when the Jeffersonians were in power, seems far more restrained than his 1799 essay written when the Republicans were in opposition. In 1799, Tucker doubted that the idea of "licentiousness" was a useful way of thinking about press freedom.\textsuperscript{155} In 1803, after asking if no protection for reputation existed, Tucker pointed to state law. He "explicitly disavow[ed] the most distant approbation of... licentiousness. A free press, conducted with ability, firmness, decorum, and impartiality, may be regarded as the chaste nurse of genuine liberty ...."\textsuperscript{156} However, a press "stained with falsehood, imposture, detraction, and personal slander, resemble[d] a contaminated prostitute."\textsuperscript{157} He emphasized the obligation to submit to the judgment of those whose authority [the writer] cannot legally, or constitutionally dispute. In his statements of facts he is bound to adhere strictly to the truth; for any deviation from the truth is both an imposition upon the public, and an injury to the individual whom it may respect. In


\textsuperscript{153} Id. ed. app. at 13.

\textsuperscript{154} Tucker, \textit{Letter to a Member of Congress}, supra note 119, at 38; see also Tucker, \textit{Right of Conscience}, supra note 152, ed. app. at 13, 19-21 (referring to the Virginia Bill of Rights and contrasting rights in American constitutions to the British approach).

\textsuperscript{155} Tucker, \textit{Right of Conscience}, supra note 152, ed. app. at 29.

\textsuperscript{156} Id.

\textsuperscript{157} Id.
his restrictures on the conduct of men, in public stations, he is bound to do justice to their characters, and not to criminate them without substantial reason .... Whoever knowingly departs from any of these maxims is guilty of a crime against the community, as well as against the person injured ....\(^{158}\)

Tucker concluded this branch of his discussion by noting that, although the federal Constitution wisely prohibited federal restraint on freedom of the press, "yet for injuries done the reputation of any person, as an individual, the state-courts are always open, and may afford ... competent redress."\(^{159}\) In 1799, Tucker saw the uncontrollable right to criticize as essential to representative government. By 1803, he was more guarded.

What Tucker meant by his exceptions to the right of citizens to criticize the conduct of public officials is hard to determine. Tucker limited state power over speech to the power to punish defamation, defined as false statements of fact about a person's individual, as opposed to political, character. But his references to the "conduct of men, in public stations" suggested a broader power to suppress criticism.\(^{160}\) A broadly defined power to suppress speech in order to protect property could also undermine the right to criticize slavery. That view seems inconsistent with Tucker's understanding of the function of free speech in a democracy and with his own criticism of slavery.

Tucker did not live to see the full extent of the uproar over abolitionist attacks on slavery and calls for immediate abolition. As a result, we cannot know how he would have responded in Virginia's emotionally charged climate in the thirty or so years before the Civil War.

One might attempt to reconcile Tucker's 1799 and 1803 views by noting that in 1799 he addressed federal government action while in 1803 he referred to state action. Still, if, as Tucker suggests, "a representative democracy ceases to exist ... whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the

\(^{158}\) Id.
\(^{159}\) Id. ed. app. at 30.
\(^{160}\) Id. ed. app. at 29.
conduct of those who may advise or execute it," then a broad right to criticize the policies of public men and to advocate public measures must also exist against state governments. Tucker's principle of the unrestrained right to publish "opinions on any public measure," if fully controlling, also supports the right to criticize slavery and urge its abolition. In the end, after Tucker was dead, southern states proscribed anti-slavery expression, including that of Lincoln's Republican Party.

If Tucker's approach to free speech in 1803 represented a retreat from libertarian statements about the right to criticize public officials, he was not alone in suggesting restriction. In 1803, President Thomas Jefferson wrote Thomas McKean, the governor of Pennsylvania, complaining about the press' "licentiousness [and] lying." Jefferson urged selective prosecutions under state law to avoid the appearance of a persecution. In 1804, Jefferson wrote Abigail Adams to explain that, while the federal government lacked power over the press, states could act against "the overwhelming torrent of slander, which is confounding all vice and virtue, all truth & falsehood in the U.S." Jefferson, in a phrase similar to Tucker's, referred to the "prostitution" of the press.

James Burgh, the English political writer and educator whom Tucker cited in 1799, took a less equivocal stand in favor of the right to criticize public officials. According to Burgh, subjects had a right and a duty to keep "a watchful eye on the conduct of Kings, Ministers, and Parliament." Indeed, Burgh said, subjects should

162. Id.
163. CURTIS, supra note 42, at 260-99 (discussing suppression of antislavery speech in the South). For an extensive statement of Republican views, see the speech of Representative James Wilson infra text accompanying note 291.
165. Id.
166. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in FREEDOM OF THE PRESS, supra note 164, at 367.
167. Letter from Thomas Jefferson to Thomas McKean, supra note 164 ("The federalists having failed in destroying the freedom of the press by their gag-law, seem to have attacked it in an opposite form, that is by pushing it's licentiousness & it's lying to such a degree of prostitution as to deprive it of all credit."); see also id. at 372.
168. 3 JAMES BURGH, POLITICAL DISQUISITIONS 247 (Da Capo Press 1971) (1774).
be encouraged to alarm their “fellow subjects” of “every attempt on public liberty.” Otherwise, the state might be ruined by the “blunders” or “villainies” of their leaders. Allegedly libelous words in legal proceedings or petitions to Parliament were not punishable, Burgh said, because “freedom of speech and writing [were] indispensably necessary to the carrying on of business.” Similarly, he suggested, a broad immunity from legal consequences was necessary for all subjects because they were concerned in the business of representative government.

Burgh believed that truth was not a sufficient defense to a charge of libeling a public official, and he anticipated the idea of libel law as chilling truthful speech. People should be able to say or write what they please “on the conduct of those who undertake the management of national affairs.... For if you punish the slanderer, you deter the fair inquirer.”

Even assuming that Tucker embraced a broad protection for free speech at the state and national levels, his aristocratic insistence on protecting the political power of slavery to protect wealth in slaves would later prove to be in substantial tension with his democratic theory. Extra political power protected slavery and, as future events were to show, slavery threatened democracy. Slavery undermined free speech and broad education, both of which are crucial for meaningful political freedom.

169. Id.
170. Id. at 246.
171. Id. at 247.
172. Id.
174. See generally CURTIS, supra note 42, at 194-288 (describing legal theories supporting and opposing the suppression of free speech). This assumes, of course, that the right to advocate peaceful change on the issue of slavery is protected speech and suppression of such speech on the leading political issue of the day is inconsistent with democracy. See id. at 421-22.
III. TUCKER ON PROTECTING WEALTH: AN ECONOMIC CONSERTISM IN TENSION WITH DEMOCRACY

A. Slavery, Race, and Democracy: One White Man, One Vote?

Tucker favored extra political power for people holding wealth in the form of land and slaves. That system left the fate of slavery to a political system dominated by slaveholders. Such a system was not likely to favor emancipation. Of course, other substantial obstacles to emancipation existed, including racism and fears that nonslaveholding whites had of competition from newly freed slaves. Even if a fairly apportioned Virginia legislature had passed laws designed to abolish slavery, what the result would have been is unclear. Perhaps the heavily slaveholding areas would have seceded from the rest of Virginia before the Civil War, or perhaps Virginia would itself have dissolved into civil war.

Of course, extra political power for slavery was not a new idea. The Three-Fifths Clause\(^\text{175}\) gave extra political power to the slave states. At the same time, southern state laws and constitutions often gave extra state legislative power to sections of the slave states holding the largest number of slaves. Some southern states also had three-fifths clauses for one or both houses of the legislature. In others, such as Virginia, malapportionment gave extra political power to counties with the greatest numbers of slaves.\(^\text{176}\)

In 1776, Virginia's easternmost and heavily slaveholding counties, with about one-third of the commonwealth's white population, had a majority in both houses of the legislature. Furthermore, in 1776, suffrage was limited to white males who owned one hundred acres of unimproved land or twenty-five acres with a house.\(^\text{177}\) In his Notes on the State of Virginia, Jefferson criticized these undemocratic arrangements and suggested reforms.\(^\text{178}\) In 1785, the Virginia legislature reduced the voting

\(^{175}\) U.S. CONST. art. I, § 2, cl. 3.

\(^{176}\) See generally Charles S. Sydnor, The Development of Southern Sectionalism 1819-1848, in 5 A HISTORY OF THE SOUTH 44-60, 283-87 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1948) (comparing the legislative structure of several southern states, most notably Virginia, in the early nineteenth century).


\(^{178}\) Id. at 274-75.
requirement to fifty acres of unimproved land, allowing between forty and fifty percent of the commonwealth's adult males to vote.\textsuperscript{179}

Tucker opposed reform of the legislature in the direction of greater democracy. He thought that representation in the legislature should reflect the benefits and burdens of government as experienced by different classes. The rich lands and valuable slaves of the Tidewater region exposed slaveholders to higher taxes. Because “[l]ands and slaves have ever been the subjects of the productive revenues of the state, and will probably so remain,” Tucker believed that these areas should have extra political power.\textsuperscript{180} “[I]t ought to be a fundamental principle,” Tucker suggested, “that taxation and representation should be equal and always go hand in hand.”\textsuperscript{181}

Tucker thought that extra political power was essential to protect the wealthy minority. In the South, this minority was composed largely of slaveholders. Tucker argued:

[I]f they who pay nothing, or very little, are entrusted with the imposition of burdens, of which they are to feel no part, there is too much reason, from the experience of all ages and countries, to apprehend that they may be regardless of the burden they impose; especially if the question should relate to the compensation to be made to themselves, or their own immediate constituents .... \textsuperscript{182}

Tucker also rejected representation based on the number of fighting men, a view suggested by Jefferson's Notes on the State of Virginia.\textsuperscript{183} In times of peace, Tucker said, no fighting is required, and “the whole burden of government is altogether pecuniary.”\textsuperscript{184} In times of war, fighting men bear a personal burden, but, he suggested, such burdens end with the end of the war.\textsuperscript{185} “[P]ecuniary burdens” of government must also increase during war, but the

\textsuperscript{179} Freehling, supra note 6, at 338.
\textsuperscript{180} St. George Tucker, Of the Constitution of Virginia, in 1 Tucker, Blackstone's Commentaries, supra note 1, ed. app. at 102-03 [hereinafter Tucker, Virginia Constitution]; see also Doyle, supra note 3, at 20.
\textsuperscript{181} Doyle, supra note 3, at 21.
\textsuperscript{182} Tucker, Virginia Constitution, supra note 180, ed. app. at 101.
\textsuperscript{183} Id. ed. app. at 101-02.
\textsuperscript{184} Id. ed. app. at 101.
\textsuperscript{185} Id.
taxpayers "may continue to pay [those burdens] for a century, or perhaps forever." This view ignores the long-term effects of lost opportunities and the long-term burden imposed on a family by the death or serious injury of a soldier.

Tucker invoked the precedent of the federal Constitutional Convention. There the South rejected representation based on fighting men and insisted instead on counting slaves as three-fifths of a person. Just as slave representation swelled the South's electoral power in the nation, Tucker said it should swell that of Virginia's slaveholding regions. Tucker favored a reapportionment reform that would make Virginia's voting districts follow the congressional districts crafted under the three-fifths rule. Under this approach, in 1802, a congressman from the western Fifth District represented "over twice the number of white constituents as his counterpart from the Tidewater Eighteenth."

Tucker's views on representation are consistent with his economic conservatism. For Tucker, the economic inequality that characterized his society was a natural result of freedom and varying human talents, and needed protection. Tucker said that "equality, in a democracy, is to be understood, [as] equality of civil rights, and not of condition. Equality of rights necessarily produces inequality of possessions .... [S]ome men have more ... skill and ingenuity ... and their property must become unequal." Tucker did not consider the effects of inheritance. Nor, for that matter, did he discuss how political power is often used to promote the interests of wealth, or how poverty might blight natural talents. Professor Doyle writes that suffrage and apportionment laws favoring rich slaveholders "exacerbate[d] material inequality, promote[d] popular ignorance ..., and hinder[ed] enlightened decisionmaking at the polls." Substantial tension existed between

186. Id.
187. See id. ed. app. at 101-02.
188. Doyle, supra note 3, at 19-20.
189. Id. at 19.
190. Tucker, Several Forms of Government, supra note 2, ed. app. at 28.
Tucker’s support for popular sovereignty and a democratic republic, and his elitist political views.

Tucker’s support for restricted suffrage was not shared by all political thinkers. Jefferson, as we have seen, favored expanding Virginia’s suffrage. Specifically, Jefferson favored universal white male suffrage along with equal representation.194 James Burgh, a writer Tucker cited in 1799, also argued for vastly expanded suffrage in Great Britain. In his Political Disquisitions, Burgh wrote that “[e]very man has what may be called property, and unalienable property. Every man has a life, a personal liberty, a character, a right to his earnings, a right to a religious profession and worship according to his conscience ....”195 As a result, Burgh said, “the poor are in danger of being injured by the government in a variety of ways.”196 Still, he acknowledged the “commonly received doctrine, that servants, and those who receive alms, have no right to vote for members of parliament.”197 As a result, he wrote, “an immense multitude of the people are utterly deprived of all power in determining who shall be the protectors of their lives, their personal liberty, their little property ... and the chastity of their wives and daughters.”198

Burgh said that in the aggregate the “little property” of the poor amounted to “a very great object.”199 Although the poor were given “no share in determining who shall be the lawgivers,” they bore “a very heavy share” of the tax burden, including taxes on malt, beer, leather, soap, and candles, which were “paid chiefly by the poor.”200 These taxes, he said, were equivalent to “a heavy land-tax. The landed interest would complain grievously if they had no power of electing representatives.”201 So, Burgh favored representation for all who paid taxes. Burgh also criticized parliamentary mal-

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195. 1 BURGH, supra note 168, at 37.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id.
201. Id. at 37-38.
apportionment by which the number of persons represented by members of parliament was grossly unequal.\textsuperscript{202}

\textit{B. Tucker on Entail and Primogeniture}

Although Tucker favored extra political power for the wealthy and supported a malapportioned legislature to ensure it, he also seems to have favored steps to limit the development of a hereditary aristocracy of wealth. Today, this dual concern may strike some as paradoxical. But others, including Daniel Webster, expressed similar ideas. Webster, speaking in 1820, said, "[a] republican form of government rests not more on political constitutions, than on those laws which regulate the descent and transmission of property."\textsuperscript{203} According to Webster, "The freest government, if it could exist, would not be long acceptable, if the tendency of the laws were to create a rapid accumulation of property in few hands, and to render the great mass of the population dependant, and penniless."\textsuperscript{204} Indeed, Webster believed that "[u]niversal suffrage ... could not long exist in a community where there was great inequality of property."\textsuperscript{205} Still, Webster, like other Massachusetts conservatives on the issue of suffrage, advocated maintaining property qualifications in one branch of the Massachusetts legislature.\textsuperscript{206} Like Tucker, Webster insisted that "property should have its due weight and consideration," with political protections to prevent "revolutions against property."\textsuperscript{207}

In Virginia's government, Tucker said that certain fundamentals "ought to be fixed [in the commonwealth's constitution] beyond the power of the ordinary legislature to alter."\textsuperscript{208} These concerned "the rights of the citizen" and, remarkably, "the disposition of the

\textsuperscript{202} \textit{Id.} at 39-54.

\textsuperscript{203} Daniel Webster, \textit{First Settlement of New England} (1820), \textit{reprinted in Political Thought in America} 199 (Andrew M. Scott ed., 1965).

\textsuperscript{204} \textit{Id.} at 200.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} Daniel Webster, \textit{Speech on "Apportionment of the Senate" in the Massachusetts State Convention of 1820-1821}, \textit{reprinted in Political Thought in America, supra note 203}, at 201.

\textsuperscript{207} \textit{Id.} at 203.

\textsuperscript{208} Tucker, \textit{Virginia Constitution, supra note 180}, ed. app. at 117.
permanent property within the state." 209 Tucker wanted two constitutional provisions relating to the disposition of permanent property: "the abolition of entails, and the establishment of the succession to estates, in parcnary." 210 The Virginia parcnary statute that Tucker favored provided for equal division among all male and female children. 211 According to Tucker, the statute abolished the common law rule that, if "any person having title to an estate of inheritance in fee simple" died intestate, the estate passed to the eldest son. 212 One might think that Tucker's constitutional concerns were simply about a freer market in land. That, however, seems not to be the case. Rather, Tucker described abolition of entail and succession to estates in parcnary as "two fundamental laws of a democratic state." 213 Though the reference is cryptic, Tucker seems to hold a view that was once widely accepted. That view saw democracy as opposed to aristocracy, and aristocracy as related to excessive concentration of economic power, especially in land. 214 This view was expressed by Alexis de Tocqueville. Writing in the 1830s, de Tocqueville suggested that the inheritance laws ought "to be placed at the head of all political institutions; for they exercise an incredible influence upon the social state of a people, while political laws show only what this state already is." 215

209. Id.
210. Id. Entail allowed testators or donors to provide that their real property should descend to and remain the property of their heirs. BLACK'S LAW DICTIONARY 572 (8th ed. 2004). Tucker opposed this device, which required property to remain in the family and to be held by successive heirs. Parcnary, which Tucker favored, was a statute that applied when a person who held real property died without a will.
211. St. George Tucker, Discourse Concerning the Several Acts Directing the Course of Descents, in Virginia, in 3 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 1, ed. app. at 18-19 [hereinafter Tucker, Descents in Virginia].
212. Id. ed. app. at 14-15.
213. Tucker, Virginia Constitution, supra note 180, ed. app. at 117 (emphasis added).
De Tocqueville continued, “When framed in a particular manner, [the law of inheritance] unites, draws together, and vests property and power in a few hands; it causes an aristocracy, so to speak, to spring out of the ground.” Formed on other principles, “it divides, distributes, and disperses both property and power”—it produces a democracy. So de Tocqueville saw American legislation ending the monopoly on inheritance enjoyed by the eldest son as a powerful engine producing democracy. In an age of large families, there was much to his view.

In his brief passage, Tucker seems to express similar views. If so, he was concerned not only with protecting wealth from democracy but also, at least to some extent, with protecting democracy from an aristocracy of concentrated and inherited wealth. Though the parcenary law applied only to intestate succession, Tucker thought that the natural affection of parents for all their children would ordinarily lead to wills with similar provisions. If so, both the statute and the operation of natural affection could help to limit the concentration of property in a few hands.

IV. TUCKER ON PUBLIC EDUCATION

Like free speech, education is central to democratic government. Tucker supported public education. In Tucker’s Blackstone’s, he noted a Virginia act that allowed, but did not require, elected aldermen to provide public education for their districts. The county court was first to determine whether any election for aldermen should occur. No election was required. Tucker commented that the discretion to carry out the act, or not, was “calculated to defeat it’s [sic] execution, in every county where

and a poor allocation of resources, but also is unconstitutional.”); James G. Wilson, Why a Fundamental Right to a Quality Education Is Not Enough, 34 Akron L. Rev. 383, 383-86 (2000) (arguing that popular economic reform must accompany judicially imposed educational reform).

216. 1 Tocqueville, supra note 215, at 48.
217. Id.
218. See Tucker, Descents in Virginia, supra note 211, ed. app. at 18.
220. Id.
illiberal and parsimonious magistrates may compose the court; or, illiberal and parsimonious persons be chosen as alderman."

According to Tucker, the provision also showed

an opposition to the act in the legislature, itself, founded upon the most illiberal, and parsimonious principles, without any regard to the public good. For it must be evident that the act will only be carried into execution in those counties, where liberality of sentiment, and a just estimation of the value of education, prevail, and not in those, where they are most wanted.

Tucker also attributed his emancipation proposal's defeat to narrow self-interest similar to the narrow and parsimonious self-interest that he said had hobbled the bill for public education.

V. DEVELOPMENTS AFTER TUCKER'S DEATH

A. The Virginia Constitutional Convention of 1829

By 1829, demands for greater democracy produced a Virginia state constitutional convention. There, champions of "conservative" eastern interests, who represented the areas with the most slaves, again opposed democratic reform. Like Tucker, they insisted on representation for property and people. Able Upshur, a delegate from the Eastern Shore, admitted that "[a]s a general proposition ... in free Governments, power ought to be given to a majority." Still, democracy "required 'identity of interests' among members of the political community." But, as Upshur pointed out, the slaveholding areas of the Commonwealth had a unique interest in slaves. Democratic representation would subject the slaveholders to "peculiar impositions" and "peculiar hazards" from those

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221. Id.
222. Id. ed. app. at 88-89.
223. See id. ed. app. at 31-32.
224. See FREEHLING, supra note 6, at 47.
225. See id. at 47-50.
226. See id. at 70-76.
227. Id. at 53 (citing COMMONWEALTH OF VA., PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, at 70-71, 74-76).
228. Id.
229. Id.
parts of the commonwealth where slaveholding was rare and opposition to slavery was extensive.230

In contrast, reformers insisted that giving political power to property holders tended toward “aristocracy or oligarchy”231 giving the “few, who are rich, a control over the many who are poor.”232 They charged that such laws violated the doctrines of majority rule and equality, principles set out in Virginia’s Declaration of Rights.233

The 1829 constitutional convention, dominated by eastern “conservatives,” passed some grudging reforms. But the reforms left the heavily slaveholding regions in a dominant position.234 The new voting requirements still disfranchised about one-third of the white population.235 The issue between democratic reformers and “aristocratic conservatives” at the convention was between democracy and slavery.236 Indeed, the basic question in Virginia’s political battles between 1829 and 1861 was whether slavery was compatible with majority rule.237

B. Extra Political Power for Slaveholders Helped Defeat a Plan to End Slavery in Virginia

The danger of slave rebellions was one of the reasons Tucker favored emancipation. In 1831, Virginia had a horrific rebellion when Nat Turner and his fellow rebels killed more than fifty white slaveholders, mostly women and children.238 The Nat Turner rebellion led to a Virginia legislative debate on ending slavery in Virginia, which in turn produced a struggle for freedom to criticize slavery.239

230. Id. at 53-54.
231. Id. at 60.
232. Id. at 52 (citing COMMONWEALTH OF VA., PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, at 54-62).
233. Id. at 60.
234. See id. at 77-81.
235. Id. at 77.
236. Id. at xii.
237. Id.
238. Id. at 3.
239. See id. at xii.
Virginia's "aristocratic conservatives" objected to debating the subject. They considered discussion dangerous and improper.\textsuperscript{240} "We debate it—the Press debates it—everybody debates it ... as if the slaves around us had neither eyes nor ears," complained Representative James H. Gholson.\textsuperscript{241} Supporters of debating the issue invoked basic democratic principles. "The time has passed," said Representative William Henry Broadnax, "when there can be any 'sealed subject' in this country.... The spirit of the age will not tolerate suppression."\textsuperscript{242}

Though the debate was open and spirited, a proposal to submit gradual abolition to the voters was narrowly defeated.\textsuperscript{243} In 1829, demands for equal political representation based on white voters had been defeated in the Virginia constitutional convention.\textsuperscript{244} Opponents of majority rule (by white men) insisted that it would threaten slavery.\textsuperscript{245} In 1831 and 1832, the Virginia Constitution's undemocratic nature helped do the work that "aristocratic conservatives" had envisioned: protecting slavery from abolition. Those western areas of the commonwealth, whose representatives most strongly supported abolition, were the areas that remained underrepresented.\textsuperscript{246}

This point requires qualification, however. Thomas Jefferson's grandson made one of the main proposals to abolish slavery in the Virginia legislature in 1831 and 1832.\textsuperscript{247} It provided for gradual emancipation, but left open the possibility that slaves could be sold south before the act's effective date, and it required colonization of emancipated slaves.\textsuperscript{248} Even if the legislature had voted for some

\begin{footnotes}{10}
\footnotetext{240} Id. at 137.
\footnotetext{241} Id. (citing RICHMOND ENQUIRER, Jan. 21, 24, 1832).
\footnotetext{242} Id. at 140-41 (quoting William H. Brodnax (of Dinwiddie), Policy of the State with Respect to Its Colored Population, Address Before the House of Delegates of Virginia (1832)).
\footnotetext{243} See id. at 192-93.
\footnotetext{244} See id. at 193.
\footnotetext{245} See id. at 54.
\footnotetext{246} See, e.g., id. at 270 (comparing Virginia's white population to the 1829-1830 apportionment of delegates).
\footnotetext{247} Id. at 129.
\footnotetext{248} See id. at 129-30; see also A. Leon Higginbotham, Jr. & F. Michael Higginbotham, "Learning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1230-31 (1993) (noting the efforts of the American Colonization Society, which was funded by the Virginia Assembly, to colonize freed slaves in Liberia).\end{footnotes}
form of abolition, it is not clear that the slaveholding parts of the commonwealth would have accepted it. After all, in 1860 the South seceded rather than face exclusion of slavery from the national territories. One reason, expressed by Jefferson Davis and others, was to protect wealth in slaves.\textsuperscript{249} It seems unlikely that Virginia's slaveholding regions would have acquiesced in a far greater intrusion on slavery in the 1830s. In any case, political arrangements like those favored by Tucker helped ensure that the experiment would not be tried.

As time passed, the grip of slavery tightened. In 1782, Virginia allowed slave owners—subject to certain qualifications—to free slaves in their wills or by other written instruments.\textsuperscript{250} By 1862, during the Civil War, the Virginia legislature prohibited manumission altogether.\textsuperscript{251}

C. Later Incarnations of Ideas Raised by Tucker

Tucker wrote in the context of his times. People's views can and do change with changes in their perception of their interests and with changes in the social environment. How Tucker would have responded, for example, to the crisis of southern democracy that preceded the Civil War, or to Reconstruction, is impossible to know. Nor can we know whether Tucker would have "refined" his support for free speech when faced with agitation for immediate abolition. When Tucker wrote that slavery was inconsistent with democracy, he was not thinking about southern suppression of antislavery speech in the face of abolitionists' harsh denunciations of slavery and slaveholders. Would he have seen the suppression of abolitionists as an appropriate exercise of states' rights? After the Civil War and the post-Civil War Amendments, how would he have viewed race and Bill of Rights questions? Tucker wrote about states' rights in the late eighteenth and early nineteenth centuries, not about the Thirteenth, Fourteenth, and Fifteenth Amendments, or the Reconstruction Acts.

\textsuperscript{250} Higginbotham & Higginbotham, \textit{supra} note 248, at 1257.
\textsuperscript{251} Id. at 1268.
The next section of this Article moves beyond St. George Tucker to consider briefly the later career of some issues that Tucker confronted in a very different context. The discussion does not break new ground. Instead, it seeks to put the issues in a larger and later context.

1. Slavery and the Suppression of Antislavery Speech

In his *Dissertation on Slavery*, Tucker wrote that slavery was incompatible with democracy.\(^{252}\) Beyond a cryptic citation to the Virginia Declaration of Rights, Tucker did not elaborate.\(^{253}\) In the years following Tucker's death, the tension between slavery and democracy became increasingly stark. Before the Civil War, the Supreme Court held that the guarantees of the Bill of Rights did not limit the states.\(^{254}\) At least at first, a wide consensus existed in both the North and the South that the regulation of slavery and of antislavery speech was a state-law matter.\(^{255}\) These facts, plus vague concepts like licentiousness and bad tendency made suppression of antislavery speech more palatable. When he wrote about the Sedition Act, Tucker's states' rights philosophy supported free speech. But in the years between 1830 and 1860, the right to free speech and the right of southern states to suppress antislavery speech were on a collision course.

As the sectional crisis intensified, the southern elite advanced various reasons to justify suppressing antislavery speech. They emphasized the danger of slave revolts and the threat of disunion and civil war. But another interest was undoubtedly at work as well—protection of slave “property” from the democratic process. The potential danger of a political attack on slavery was real. In most southern states, slaveowners were a distinct minority, but they had countervailing advantages: racism and fear of economic competition from free blacks.

In 1831 and 1832, after the Nat Turner rebellion, the Virginia legislature debated and came close to passing a plan to gradually

252. TUCKER, DISSERTATION ON SLAVERY, supra note 9, at 48-49.
253. Id.
255. See, e.g., CURTIS, supra note 42, at 4-7, 10 (discussing the free speech debate from the Sedition Act of 1798 to the Supreme Court's holding in *Barron*).
end slavery in Virginia. After their victory in the 1831-1832 battle over ending slavery in the Virginia legislature, abolition opponents continued to complain about allowing the subject to be debated. One conservative aristocrat, writing as “Appomatox,” called for a boycott of Virginia newspapers that discussed the abolition issue. "Let us pay no regard," he wrote, "to claims for ... independence of the press." But, as Alison Freehling reports, Appomatox faced substantial criticism. The "tone and temper of [the pamphlet], a 'Subscriber,' protested, [was] better suited to the arrogance of a Dictator than to the equality of a republican citizen." Another writer, under the name Jefferson, asked if Appomatox subscribed to "the aristocratic principle' that only rich slaveholders [had] 'any right to deal with abolition." "Jefferson" insisted that Virginians should "read all' house speeches and 'newspaper essays' on 'both sides." He also urged them to elect representatives who favored full inquiry.

Although the Virginia debate had been full and open, the tide began to turn. In Virginia, the "conservative" supporters of slavery succeeded in tarring advocates of reform as allies to the "fanatical" abolitionists of the North, who, like William Lloyd Garrison, favored full equality for blacks.

As sectional conflict over slavery intensified, free speech on the subject of slavery began to disappear in the South. Southern states criminalized speech that tended to incite discontent or insurrection among slaves or free blacks. The southern elite interpreted the laws broadly and applied them to people who circulated anti-slavery literature to whites. On the subject of slavery, white voters were reduced to reading material fit for slaves. The following examples

256. See supra Part V.B.
257. See supra Part V.B.
258. FREEHLING, supra note 6, at 198 (citing APPOMATOX [BENJAMIN WATKINS LEIGH], THE LETTER OF APPOMATOX TO THE PEOPLE OF VIRGINIA 7, 27-30 (1832)).
259. Id. at 199 (quoting RICHMOND ENQUIRER, Feb. 16, 1832).
260. Id. at 200.
261. Id.
262. Id.
263. Id. at 221.
264. See, e.g., State v. Worth, 52 N.C. (7 Jones) 488 (1860); see also CURTIS, supra note 42, at 295.
show the extent to which the South became a closed society on the subject of slavery.

In 1835, an Alabama jury indicted R. G. Williams, the publishing agent for the abolitionist paper The Emancipator, for an article in the New York paper. The offending passage was set out in the indictment: "God commands, and all nature cries out, that man should not be held as property. The system of making men property, has plunged 2,250,000 of our fellow countrymen into the deepest physical and moral degradation, and they are every moment sinking deeper."\(^{265}\) The criticism of slavery that produced the Alabama indictment was no stronger than many Tucker had made. Though the governor of Alabama demanded extradition of Williams for trial in Alabama on this indictment, the Governor of New York refused, citing states' rights.\(^{266}\)

Virginia had produced some strong defenders of free speech, as Tucker's work and Madison's Report of 1800\(^{267}\) for the Virginia legislature on the Sedition Act illustrate. But the acid of slavery soon ate away at free speech in Virginia as well:

On March 23, 1836, Virginia passed a comprehensive act aimed at suppressing anti-slavery agitation.... The law provided a fine and mandatory imprisonment of "any member of an abolition or anti-slavery society" who "shall come into this state, and shall here maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery."\(^{268}\)

It also criminalized circulating material "with the intent of persuading persons of colour ... to rebel, or denying the master the right of property in their slaves, and inculcating the duty of resistance to such right."\(^{269}\)

The 1836 act required postmasters to notify a justice of the peace of incendiary documents in the mail; willing recipients were to be

\(^{265}\) Curtis, supra note 42, at 161 (citing William Jay, Miscellaneous Writings on Slavery 151 (Negro Univ. Press 1968) (1853)).

\(^{266}\) Id. at 203-04.


\(^{268}\) Curtis, supra note 42, at 260-61.

\(^{269}\) Id. at 261.
prosecuted. The act also required the postmaster to burn such items. Under this act, in 1859, a Virginia postmaster banned the *New York Tribune*, a leading Republican paper. In North Carolina in 1850, a Wesleyan minister gave a young white girl a pamphlet asserting that slavery violated the Ten Commandments. He was charged with violating the state's incendiary documents statute, convicted, and sentenced to a year in prison and twenty lashes. The antislavery preacher escaped these harsh punishments when he was released as part of an agreement that he leave the state.

In 1856, Benjamin Hedrick, a professor of chemistry at the University of North Carolina, supported James C. Fremont, the Republican candidate for President. The *Raleigh Weekly Standard* "exposed" Hedrick and the university discharged him for the offense of supporting Fremont. Hedrick returned to his home in Salisbury, North Carolina, but the threat of mob violence forced him to flee the state.

The *Weekly Standard* crowed about its achievement:

> Our object was to rid the University and the State of an avowed Fremont man; and we succeeded. And we now say, after due consideration ... that no man who is avowedly for John C. Fremont for President ought to be allowed to breathe the air or to tread the soil of North Carolina.

Hedrick's experience was not an isolated incident. In the Lincoln-Douglas debates, both Lincoln and Douglas agreed that Republicans could not campaign in the South.

After the 1856 presidential election, Hinton Helper, a North Carolinian, published a searing attack of slavery. Helper's experience shows again the persistence of issues of wealth, slavery, and democracy. Helper's book urged non-slaveholders in southern states to unite to abolish slavery by peaceful political means. But Helper

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270. Id. (citing CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH 211-12 (1964)).
271. Id. at 263.
272. Id. at 290-92.
273. Id. at 290 (citing Benjamin Hedrick, *Once More*, RALEIGH WKLY. STANDARD, Nov. 5, 1856, at 1).
274. Id. at 282; see also CREATED EQUAL, THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 290-91 (Paul Angle ed., 1958).
also advocated fighting back if the "lords of the lash" and their "cringing lickspittles" used violence to suppress democratic action.\textsuperscript{275} He pointed out that there were many more non-slaveholders than slaveholders, not counting the slaves who, Helper said, in nine cases out of ten would be delighted to cut their masters' throats.\textsuperscript{276}

Helper made a class appeal to non-slaveholding whites, contending that slavery injured whites. Kenneth Stampp's study of slavery supports the thesis that slavery harmed white workers. According to Stampp:

[White workers found their bargaining power severely restricted as long as employers were able to hire slaves and keep them at subsistence levels. In 1860, the average annual wage of textile workers in New England was $205; in the South it was $145. Even in industries that employed no slaves, the threat to employ them was always there nonetheless. The replacement of white labor with slaves after a strike in Richmond's Tredegar Iron Company was a dramatic illustration of the free worker's weak position in the South. A low standard of living for Negro labor meant a low standard of living for white labor too.\textsuperscript{277}]

Shortly before the election of 1860, leading Republicans subscribed to a plan to publish an abridged version of Helper's book for use as a campaign document.\textsuperscript{278} A central plank in the platform of the new Republican Party was opposing slavery in the territories.\textsuperscript{279} Helper's thesis was that slavery harmed white workers and small farmers.\textsuperscript{280} That thesis was clearly relevant to the national debate over planting slavery in the territories. Still, the fact that Helper's book was part of the national debate over slavery did not protect it.

In 1859, Daniel Worth, another North Carolina Wesleyan minister, was indicted for circulating Helper's book.\textsuperscript{281} Worth was

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\textsuperscript{275} HINTON ROWAN HELPER, THE IMPELLING CRISIS OF THE SOUTH: HOW TO MEET IT 149 (New York, A.B. Burdick 1860); see CURTIS, supra note 42, at 271-72.
\textsuperscript{276} HELPER, supra note 275, at 149.
\textsuperscript{277} KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLavery in the ANTE-BELLUM SOUTH 426 (1956).
\textsuperscript{278} CURTIS, supra note 42, at 272.
\textsuperscript{279} See id. at 272-77.
\textsuperscript{280} Id. at 271.
\textsuperscript{281} Id. at 293-94.
\end{flushleft}
charged under the North Carolina law that forbade circulating publications that tended to make slaves discontent.\footnote{Id. at 293.} For distributing the Helper book to whites, Reverend Worth was tried, convicted, and sentenced to prison.\footnote{Id. at 294-95.} Pending his appeal, Worth was released on bail and fled the state.\footnote{Id. at 294.} In 1860, the North Carolina General Assembly amended North Carolina's incendiary documents statute. The new statute imposed the death penalty for the first offense.\footnote{1860-1861 N.C. Sess. Laws 39; see also CURTIS, supra note 42, at 295-96.}

In congressional debates over Helper's book between 1859 and 1860, Republicans complained that slavery had suppressed free speech in the South.\footnote{CURTIS, supra note 42, at 271-88 (discussing the congressional debate over Helper's book).} Representative John Bingham of Ohio, the future author of Section 1 of the Fourteenth Amendment, pointed out that making antislavery speeches like those uttered in the Virginia abolition debate of 1832 would cost a Virginian his life, that a mob broke up a Republican meeting in Wheeling, and that a representative to the Republican national convention in 1856 was driven from the commonwealth merely because of his attendance.\footnote{Curtis, supra note 249, at 640.}

Tucker did not live to see the conflict between slavery and free speech. But, on the eve of the Civil War, like Tucker many years before, members of Lincoln's Republican Party asserted that slavery and democracy were incompatible. They cited repression of antislavery speech as exhibit one in their case against slavery.\footnote{CURTIS, supra note 42, at 281-88, 362-63.} Slavery had silenced political speech on the major issue of the time in much of the nation. The effect of silencing antislavery speech in the South was to remove the issue from the political agenda. As a result, the status of slavery was dealt with in the awful carnage of the Civil War, not in southern politics.

In 1864, congressional Republicans debated a constitutional amendment to outlaw slavery. Several pointed to slavery's suppression of free speech and other liberties fundamental to a democratic society.\footnote{See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 37-39, 52 (1986). For earlier Republican complaints}
Judiciary Committee in the 38th Congress, made one of the most comprehensive statements.290 Wilson quoted the Constitution’s Supremacy Clause and the Privileges and Immunities Clause of Article IV, Section 2. He continued:

With these rights no State may interfere without breach of the bond which holds the Union together. How have these rights essential to liberty been respected in those sections of the Union where slavery held the reins of local authority and directed the thoughts, prejudices, and passions of the people? The bitter, cruel, relentless persecutions of the Methodists in the South, almost as void of pity as those which visited upon the Huguenots in France, tell how utterly slavery disregards the right to a free exercise of religion....

How much better has free discussion fared at the hands of the black censor who guards the interests of slavery against the expression of the thoughts of freemen? On what road of this Republic cursed by slavery have men been free to declare their approval of the divine doctrines of the Declaration of Independence? ... The press has been padlocked, and men’s lips have been sealed. Constitutional defense of free discussion by speech or press has been a rope of sand south of the line which marked the limit of dignified free labor in this country. South of that line an organized element of death was surely sapping the foundations of our free institutions, reversing the theory of our Government, dwarfing our civilization, contracting the national conscience, compassing the destruction of everything calculated to preserve the republican character of our Constitution; and no man in the immediate presence of this rapidly accumulating ruin dared to raise a voice of warning. Submission and silence were inexorably exacted. Such, sir, is the free discussion which slavery tolerates. Such is its observance of the high constitutional rights of the citizen. Its past will be repeated in its future if the people permit it to curse the world with a continued existence.

“The right of the people peaceably to assemble and to petition the government for a redress of grievances,” has been as completely disregarded as the other rights I have mentioned by the terrorism which guards the citadel of slavery. If slavery persecuted religionists, denied the privilege of free discussion,
prevented free elections, trampled upon all of the constitutional guarantees belonging to the citizen, peaceable assemblages of the people to consider these grievances with a view to petition the Government for redress could not be held .... Throughout all the dominions of slavery, republican government, constitutional liberty, the blessings of our free institutions were mere fables. An aristocracy enjoyed unlimited power, while the people were pressed to the earth and denied the inestimable privileges which by right they should have enjoyed in all the fullness designed by the Constitution.

Sir, I might enumerate many other constitutional rights of the citizen which slavery has disregarded and practically destroyed, but I have enough to illustrate my proposition: that slavery disregards the supremacy of the Constitution and denies to the citizens of each State the privileges and immunities of citizens in the several States....

[The people of the free States should insist on ample protection to their rights, privileges, and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike, and see to it that the power which caused the war shall cease to exist .... An equal and exact observance of the constitutional rights of each and every citizen, in each and every State, is the end to which we should cause the lessons of this war to carry us. Whatever stands between us and the accomplishment of this great end should be removed. Can we reach this end and save slavery? ... Can we mix the oil and water of despotism and republicanism? ... What, then, shall we do? Abolish slavery. How? By amending our national Constitution. Why? Because slavery is incompatible with free government.]

The problems of establishing free speech in a multiracial democracy did not end with the Civil War and Reconstruction. The defeat of Reconstruction, the suppression of effective political dissent, the disfranchisement of southern blacks and the maintenance of a racial caste system continued in much of the South until the 1960s.

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291. CONG. GLOBE, 38th Cong., 1st Sess. 1202-03 (1864).
2. The Black Codes

St. George Tucker saw a black code that discriminated against blacks as essential to achieve emancipation and in some respects, at least, as necessary to the regulation of the newly freed slaves. After the Civil War, leaders in southern states confronted immediate emancipation. Though the southern states had ratified the Thirteenth Amendment, they soon passed black codes to deal with the status of the newly freed slaves.

The southern states' black codes were similar though more extreme than the one Tucker proposed. The codes denied blacks many basic rights. For example, one Louisiana parish forbade a Negro from passing within the limits of the parish without a permit from his employer, prohibited Negroes from renting or keeping a house within the parish, required Negroes to be in the regular service of some white person or former owner, denied Negroes the right to hold meetings after sunset or at any time without special permission of the captain of patrol, forbade Negroes from preaching or declaiming to congregations of colored people without special permission in writing from the president of the police jury, prohibited Negroes from carrying firearms without special permission unless they were Union soldiers, and banned Negroes from selling, bartering, or exchanging merchandise without an employer's special written permission. Violators were to be fined or put in a barrel for twelve hours. Southern black codes also typically prohibited blacks from testifying against whites, owning real estate, and entering contracts.

Congressional Republicans were outraged at the black codes, which they saw as an attempt to revive slavery under another name. They thought that such laws violated the Thirteenth Amendment. In response, they proposed the Civil Rights Bill of 1866. It provided that blacks were U.S. citizens and should enjoy

292. 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279-81 (1906). The Board of Police of Opelousas, Louisiana adopted a similar ordinance. See CONG. GLOBE, 39th Cong., 1st Sess. 516-17 (1866) (reproducing the ordinance in the speech of Representative Thomas Eliot of Massachusetts).
293. 1 FLEMING, supra note 292, at 281.
294. Id.
295. Act of Apr. 9, 1866, ch. 31 Stat. 27.
the same rights as whites to own property, contract, testify, file
court actions, and enjoy the full and equal benefit of all laws and
provisions for the security of person and property as enjoyed by
white citizens. 296 The act was national in scope. 297 It and the
Fourteenth Amendment were designed to root out discrimination
against blacks in such basic rights, not only in the South, but also
in any Northern states where such discrimination persisted.

Republicans claimed that ample constitutional power existed
to pass the bill. They cited the Thirteenth Amendment's ban on
slavery, the congressional power to enforce the Amendment, and
other constitutional provisions. 298 As leading Republicans ex-
plained, the discriminations against blacks in the black codes were
badges and incidents of slavery which Congress had the power to
extirpate. 299

Democratic critics in Congress insisted that the power to outlaw
slavery did not include the power to prohibit discriminations, such
as those in the black codes. 300 They pointed out that some free
states that prohibited slavery enforced discriminatory laws. 301

No one cited St. George Tucker in the congressional debates over
the black codes, the Civil Rights Bill of 1866, or the Thirteenth and
Fourteenth Amendments. Even if the congressmen were familiar
with Tucker's Dissertation on Slavery, it is not hard to see why:
Tucker would not have suited either faction. His concept of civil
slavery could have been used to support the claim that the black
codes were a form of slavery. Tucker recognized that discrimina-
tions like those that later appeared in the black codes were a form
of slavery. Tucker also recognized that such discrimination sprang
from slavery. To that extent, his views provided support for the
Republican claim that such laws were badges of slavery that
Congress could outlaw under the Thirteenth Amendment. But
Tucker also supported a harsh black code of his own. His dire

296. Id.
297. See id.
298. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 43, 322, 941-42 (1866) (reporting
Senator Trumbull's speech about congressional power to enforce the Thirteenth
Amendment).
299. Id.
300. See, e.g., id. at 628 (reporting a speech by Representative Samuel Marshall); CURTIS,
supra note 289, at 81.
301. CONG. GLOBE, 39th Cong., 1st Sess. 628 (1866).
predictions about the behavior of newly free blacks would hardly have been helpful to Republicans in the 39th Congress. Nor would his states' rights jurisprudence have helped Republicans. On the other hand, his statements that black codes were a form of slavery would hardly have helped Democratic opponents of the Civil Rights Bill.

The Supreme Court did not interpret the Thirteenth Amendment as providing broad congressional power to reach private racial discrimination in contractual relations until the 1960s in Jones v. Alfred H. Mayer Co. The majority and the dissent cited statements by congressmen in the 39th Congress, not St. George Tucker.

3. States' Rights, Slavery, and the Rights of Blacks

Though Tucker opposed slavery, he embraced a strict construction/states' rights understanding of the Constitution. In 1799, Tucker invoked states' rights to protect the rights of aliens and the right of free speech from oppressive federal action. In his Letter to a Member of Congress, Tucker cited the Tenth Amendment and wrote that "every power which was carved out of the sovereignty of the states ... is to be construed strictly, wherever it may derogate from any power reserved to the states by the federal constitution." Although he hoped the Virginia government would act against slavery, Tucker's constitutional philosophy protected the institution from the federal government. Tucker was hardly alone in this view. In the pre-Civil War period, most abolitionists and Republicans accepted the principle that slavery in the states was beyond the federal government's power.

Tucker wrote before the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. But it is clear how the states' rights philosophy to which Tucker made important contributions functioned in the period between the Civil War and the second reconstruction of the 1960s.

303. Id. at 440; id. at 455-58 (Harlan, J., dissenting).
304. See TUCKER, LETTER TO A MEMBER OF CONGRESS, supra note 119, at 3.
305. Id.
Throughout this period of American history, the "right" of southern states to regulate blacks blocked steps toward racial equality. In the South, almost every victory over slavery and its legacy involved expansive use of national power. Examples include the Emancipation Proclamation; the Thirteenth Amendment, ratified in 1865; the Civil Rights Act of 1866; the Fourteenth Amendment, ratified in 1868; the Reconstruction Acts, which enfranchised black men in the South; the Fifteenth Amendment, ratified in 1870; the Civil Rights Acts passed in response to Ku Klux Klan violence in the South; the public accommodations Civil Rights Act of 1875; the Civil Rights Act of 1964; and the Voting Rights Act of 1965.

Supreme Court decisions that embraced a limited view of national power and a broad view of states' rights hobbled or nullified many of these acts and amendments. Only in the 1960s, with expansive applications of national power and supportive Supreme Court decisions from the Warren Court, did the nation begin a comprehensive effort to dismantle the racial caste system.

307. U.S. CONST. amend. XIII.
308. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.
309. U.S. CONST. amend. XIV.
311. U.S. CONST. amend. XV.
316. E.g., The Civil Rights Cases, 109 U.S. 3, 23-26 (1883) (limiting congressional enforcement power under the Fourteenth Amendment and adopting a narrow reading of the Thirteenth Amendment); United States v. Harris, 106 U.S. 629, 644 (1883) (striking down a Reconstruction statute as beyond congressional power); United States v. Cruikshank, 92 U.S. 542, 555-54 (1876) (reading the rights of American citizens that Congress could protect narrowly and limiting enforcement to state action, thereby shielding terrorist groups like the Klan from federal criminal prosecution for conspiracies to deprive citizens of rights such as those in the Bill of Rights); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75-78 (1873) (establishing a narrow reading of the "privileges and immunities" of citizens of the United States, thereby undermining Reconstruction statutes).
An oligarchic—and often racist—localism that embraced states' rights fought a bitter rear guard action against these advances.

VI. EVALUATION

A. Tucker on Slavery

St. George Tucker recognized the profound evil of chattel slavery. In his Dissertation on Slavery, he never denied or minimized the evil. He repeatedly said slavery was inconsistent with the American Revolution's ideals of liberty and equality. Tucker also saw that discriminations suffered by free blacks were a form of slavery.

To rid Virginia of slavery and also of blacks, however, Tucker was willing to endorse laws that harshly discriminated against free blacks. He felt that these brutal provisions were a necessary concession to prejudice. At least as an initial matter, he was unwilling to accept blacks as equal fellow citizens. That might be possible at some future date, he suggested, if race prejudice subsided. Tucker faced the dilemma of the practical reformer. A harsh black code would hardly be conducive to reducing prejudice. But without it, Tucker feared, emancipation would not be possible or practical. Still, Tucker refused to endorse mandatory deportation of freed slaves. That made him more liberal than some leading proponents of the 1830-1831 plan to end slavery in Virginia.

In part, Tucker's discriminatory plans for free blacks in Virginia may have been strategic concessions to racial prejudice. Strategy is suggested by the tension between his denunciations of prejudice and his proclamations of the humanity of slaves and the brotherhood of men on one hand and his black code on the other. It is also suggested by Tucker's frank admission in his treatise that he was
making concessions to prejudice. But in the end, unlike some Virginians, Tucker did not free his slaves. He vetoed a proposal to free his slaves in his will, fearing that such a provision would give them an incentive to poison him.318

One needs to understand Tucker’s views on slavery in the broad context of his time. Few Virginians shared the progressive views of Robert Pleasants. Tucker’s expressed unwillingness to accept blacks as equals was even shared by Abraham Lincoln before the Civil War. In his 1854 Peoria, Illinois, speech on the Kansas-Nebraska Act, Lincoln admitted that he did not know what to do about slavery in the southern states.319 His first impulse was to send freed slaves to Liberia, but he recognized problems with that solution.320

What then? Free them all, and keep them among us as underlings? Is it quite certain that this betters their condition? ... What next? Free them and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, cannot be safely disregarded. We cannot then make them equals.321

Lincoln later made substantial strides on the issue of black equality, but his views in the 1850s help put those of Tucker in a larger context.

B. Tucker on Free Speech

Tucker made a substantial contribution during the debates over the Sedition Act by reviewing and popularizing arguments for freedom of speech in a democracy. Tucker’s Blackstone set out these arguments for lawyers and students of the law. Tucker recognized the polar star by which we should navigate free speech controver-

318. Doyle, supra note 3, at 308 n.215 (citation omitted).
320. Id.
321. Id.
sies on political matters: the American idea that the people are sovereign. Presidents, congressmen, governors, and state legislators are, Tucker believed, merely "servants" who temporarily exercise power. Loyalty to the nation, as Tucker saw, must not be confused with loyalty to a particular administration or to its policies. As Tucker understood, broad protection for free speech is essential to democracy because without free speech the people cannot consider and evaluate alternatives. We cannot know what we might want the law to be unless we can consider and discuss alternatives.

Once Jeffersonians were in power, they began smarting under what they saw as Federalist misrepresentations and lies. At this later time, Tucker may have read the role for state law of defamation more broadly. If so, his later reading of broad state power is in serious tension with his descriptions of free speech in democratic government.

If an inconsistency exists here, it is an old one. Cato's Letters were a series of essays on liberty that were widely circulated in the colonies and the United States both before and after the Revolution. Speaking of free speech, Cato observed:

This liberty has been approved or condemned by all men, and all parties, in proportion as were advantaged or annoyed by it. When they were in power, they were unwilling to have their actions scanned and censured, and cried out, that such licence ought not to be borne and tolerated in any well-constituted commonwealth; and when they suffered under the weight of power, they thought it very hard not to be allowed the liberty to utter their groans ....

But, of course, in his concern with the corrosive effects of falsehoods in a democratic nation, Tucker has a point that is clear to an observer of the modern world: pervasive and effective falsehoods can undermine democracy.

Madison recognized the problem but thought the cure was worse than the disease. Some later nineteenth-century writers also

recognized the danger of abuse of press power. Their answer was that the press is fragmented into many small segments, and these many fragments of press power checked each other. In light of the pervasive power of radio, television, and consolidated media companies, this answer may be less reassuring today.

C. Wealth and Democracy

Tucker apparently saw no contradiction between his values of liberty, democracy, and education and his insistence on protecting wealth in land and slaves from democracy. Perhaps, however, we should not be too critical of Tucker on this score. For one thing, at least until the 1830s, a number of more conservative American political leaders embraced to some extent the idea that wealth deserved extra representation in the legislature. Though his particular way of protecting concentrated wealth from democracy has been repudiated, the problem is still with us.

Tucker failed to understand how concentrated wealth in slaves produced a powerful economic interest that was in many ways hostile to democracy. Indeed, he believed that government should be structured to protect such wealth. Fairly simple reforms such as "one white man, one vote" would have enhanced democracy, though not necessarily liberty. But Tucker was unwilling to contemplate such reforms because of his fear that they threatened the rights of wealth. Though we have different antidemocratic systems than


325. See, e.g., Daniel Webster, Apportionment of the Senate, Address Before the Massachusetts State Convention of 1820-1821, in POLITICAL THOUGHT IN AMERICA, supra note 203, at 201-03.

326. See, e.g., ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 322 (2000) (noting the enormous role of money in politics and how it often forces politicians to cater to the wealthy so they can get crucial funds for television advertisements).
those Tucker embraced, our modern systems also function to check democracy and to empower concentrated wealth. In light of our own shortcomings, we should not be too critical of Tucker.

D. Public Education

St. George Tucker understood the importance of public education. Proponents of democracy have long recognized the crucial function of education; an educated populace is in a far better position to understand and debate public issues and to contribute to charting the nation's course.

James Madison recognized the connection between public education and republican government. In 1822, Madison wrote to a correspondent in Kentucky and praised

[the liberal appropriations made by the Legislature of Kentucky for a general system of Education.... A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.... [A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.]

Madison believed that public education is essential for meaningful democracy. If so, slavery seems to have blighted democracy. Slave-state governments typically failed to provide public education, while the North and Midwest provided common schools and tax support for education. All but one of the states that joined the Confederacy rejected common schools in the years before the Civil War. These southern states rejected tax support for schools for white children and made teaching slaves to read a crime. "Legislative votes in Virginia and Georgia show that regions least dependent on slavery were the most inclined to


support common schools ...." Mississippi, Alabama, Tennessee, Arkansas, and Texas—states that by the 1830s accepted universal (white) male suffrage and legislative apportionment based on the white population—also failed to provide public education. Public education was finally established in the South during Reconstruction.

In 1850, twenty percent of adult whites in the South were illiterate, compared with three percent in the mid-Atlantic states and less than one percent in New England. Newspaper circulation in the South was one-fifth of what it was in New England and the mid-Atlantic states. Though Tucker supported Jefferson’s proposal for public education, the existence of extra political power for the commonwealth’s slaveholding areas, an arrangement Tucker supported, may have helped to doom taxpayer support for education in Virginia as well. In any case, slavery seems to have produced an elitist perspective that did little to promote the welfare of ordinary whites.

CONCLUSION

Today, we still struggle with the meaning of our past and with issues of race and slavery. For example, in 2004, voters in Alabama rejected an amendment to delete the Alabama Constitution’s prohibition of integrated schools. The amendment, like constitutional provisions in other states, would have also mandated free

330. Id.
331. Sydnor, supra note 176, at 284.
332. See Foner, supra note 44, at 366.
333. Starr, supra note 329, at 108.
334. Id.
336. Jannell McGrew, Black Caucus May Filibuster Bills, MONTGOMERY ADVERTISER (Ala.), Dec. 17, 2004, at C3 (discussing the voters’ defeat of a constitutional amendment that sought to remove racist language mandating segregation in schools). The head of the Alabama’s Christian Coalition warned of frivolous lawsuits if the state constitution guaranteed public education. Id. The Black Caucus in the Alabama legislature threatened to filibuster against a proposal to submit a version of the amendment without the education provision. Id.
public education. The amendment’s critics charged that such a provision might result in tax increases.

The Politically Incorrect Guide to American History, assisted by “plugs from Fox news and other conservative media,” is a New York Times bestseller. The book depicts a Confederate soldier on the cover. The author criticizes the Supreme Court’s school desegregation decision in Brown v. Board of Education as unlawful, has kind words to say about state nullification of federal laws, and argues that the Fourteenth Amendment was never constitutionally ratified. Even if it were, the author suggests it should not protect the First Amendment liberties against actions by the states. The author also suggests that the black codes passed by southern legislatures after the Civil War were hardly different from northern laws against vagrancy and other provisions in northern states.

The controversy over slavery and how it should be taught is not settled either. In December 2004, the Raleigh News and Observer reported that the Cary Christian School, “one of the area’s largest Christian schools,” had assigned the forty-three page book Southern Slavery, As It Was to its ninth-grade students. The book said it “is strange that the thing the Bible condemns (slave-trading) brings little opprobrium upon the North, yet that which the Bible allows (slave-ownership) has brought down all manner of condemnation on the South.” While admitting that slavery was not perfect, the

337. Id.
338. Id.
342. The Supreme Court has held that the Fourteenth Amendment bars state discrimination based on race and gender and requires state governments to obey most of the guarantees in the Constitution’s Bill of Rights. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968).
343. WOODS, supra note 339, at 80-84. Although some Northern states had laws that discriminated against blacks, the implication that Northern laws mirrored the Black Codes is grossly misleading. At any rate, the Civil Rights Act of 1866 was national in scope and preempted all such laws.
345. Id. (quoting DOUGLAS WILSON & STEVE WILKINS, SOUTHERN SLAVERY, AS IT WAS 22 (1996)).
authors asserted that it “was a relationship based on mutual affection and confidence.”\textsuperscript{346} Indeed, according to the book, slaves enjoyed “a life of plenty, of simple pleasures, of food, clothes, and good medical care.”\textsuperscript{347}

A school official said that the school was using the book’s twenty-first-century historical assessment to balance the picture of slavery in Harriet Beecher Stowe’s 1852 bestseller, \textit{Uncle Tom’s Cabin}, which students also read.\textsuperscript{348} He explained that his school presented a balanced picture, in contrast to the one-sided indoctrination provided in the public schools.\textsuperscript{349} As this short summary shows, struggles over slavery and its legacy continue.

St. George Tucker recognized and rejected the evil of slavery. He provided a powerful and insightful discussion of the relation of free speech to democratic government. He also recognized that opposition to those temporarily elected to office and their policies must not be confused with opposition to government.

Tucker’s declarations of principle are accompanied by applications that are distressing. He embraced a harsh black code for newly freed slaves. His concern for protecting wealth against democracy led him to accept political arrangements that further entrenched slavery, and slavery undermined democracy, even for white people. He was, in short, a man who reflected some of the contradictions of the time and place in which he lived.

Tucker’s wealth and social standing were intertwined with the powerful institution of slavery. Though he spoke movingly against the evil of slavery, he also lived with slavery and accommodated it. In accommodating evils entwined with his life, Tucker is, perhaps, not so different from most of us today.

Tucker had some wise and important things to say about slavery, racial prejudice, democracy, and free speech. Since the legacy of

\textsuperscript{346} \textit{Id.} (quoting \textsc{Wilson} & \textsc{Wilkins}, \textit{supra} note 345, at 24).

\textsuperscript{347} \textit{Id.} (quoting \textsc{Wilson} & \textsc{Wilkins}, \textit{supra} note 345, at 25). For a selection giving the perspectives of slaves, see, for example, the narratives of former slaves in \textsc{Stephen B. Presser} & \textsc{Jamal S. Zainaldin}, \textit{Law and Jurisprudence in American History} (2000). See \textit{generally} \textsc{Eugene D. Genovese}, \textsc{Roll, Jordan, Roll}: \textit{The World the Slaves Made} (1972) (exploring the divergent perspectives of masters and slaves).

\textsuperscript{348} \textit{Hui, supra} note 344.

\textsuperscript{349} \textit{Id.} Though school leaders later dropped the book because they said they had learned about “faulty footnotes and citation errors,” one of the book’s authors is scheduled to speak at the school’s graduation. \textit{Id.}
slavery persists, understanding slavery and race remains important. St. George Tucker is part of that story. Tucker’s discussions of free speech and the idea of a loyal opposition will always be relevant, especially in times of crisis, when opposition to government policy is apt to be confused with disloyalty to the nation.